United Nations E/C.19/2007/10

Economic and Social Council

Distr.: General
20 March 2007

Original: English

Permanent Forum on Indigenous Issues
Sixth session
New York, 14-25 May 2007
Item 4 of the provisional agenda*
Implementation of recommendations on the six mandated areas of the Forum and on the Millennium Development Goals

Report of the Secretariat on Indigenous traditional knowledge**

Summary

At its fifth session in May 2006, the Permanent Forum on Indigenous Issues, taking into account the recommendations of the International Technical Workshop on Indigenous Traditional Knowledge (E/C.19/2006/2, para. 41) regarding a study on customary laws pertaining to indigenous traditional knowledge, decided to appoint Michael Dodson as Special Rapporteur charged with preparing, within existing resources, a concept paper on the scope of the study that would investigate to what extent such customary laws should be reflected in international and national standards addressing traditional knowledge, and requested the Special Rapporteur to report to the Permanent Forum at its sixth session on the matter. The study would include an analysis of indigenous customary law as a potential sui generis system for protecting indigenous traditional knowledge. Relevant organizations of the system should collaborate to promote, in national legislation and policies, respect for and recognition of the customary legal systems of indigenous populations pertaining to indigenous knowledge, as well as their application.

* E/C.19/2007/1.

** Submission of the present report was delayed in order to ensure the inclusion of the most recent information.

07-27715 (E) 130407

Contents

		Paragraphs	*Page*
I.	Introduction	1–3	3
II.	Overview of the current situation	4–21	3
III.	Objectives, scope and strategy of the study	22–24	9
IV.	Issues to be considered by the study	25–55	9
	A. Identifying the question	26–31	9
	B. Determining the relationship between international, regional, national and communal forums	32–38	11
	C. Determining the relationship between the study and existing structures, activities and resources	39–43	13
	D. Potential structures and outcomes	44–55	15
V.	Concluding comments	56–61	18

I. Introduction

1. For many years, indigenous people have expressed concern about the inadequate protection of their traditional knowledge. Although this concern has not gone unheeded, the issue remains unresolved. The challenge that confronts the international community is to determine how the overall lack of protection of indigenous peoples' traditional knowledge should be remedied.

2. "Indigenous traditional knowledge" is used in the present report in general terms to mean traditional practices and culture and the knowledge of plants and animals and of their methods of propagation; it includes expressions of cultural values, beliefs, rituals and community laws, and it includes knowledge regarding land and ecosystem management. It is more often unwritten and handed down orally from generation to generation, and it is transmitted and preserved in that way. Some of the knowledge is of a highly sacred and secret nature and therefore extremely sensitive and culturally significant and not readily publicly available, even to members of the particular group. The preceding is the understanding upon which this paper is based. It is not meant to be an all-encompassing, comprehensive definition of the subject matter.

3. Since its establishment in 2000, the Permanent Forum on Indigenous Issues has made a number of recommendations calling for traditional knowledge to be addressed as a matter of urgency.[1] Recognizing that numerous United Nations and intergovernmental bodies were already actively engaged in ways to remedy the inadequate protection of indigenous traditional knowledge, an international technical workshop was convened in Panama City in September 2005 to bring together indigenous experts and United Nations agencies.[2] The International Technical Workshop on Indigenous Traditional Knowledge (henceforth referred to as the Workshop) discussed issues surrounding the protection of indigenous traditional knowledge, including approaches taken by different agencies, and made numerous recommendations. Recognizing the relationship between indigenous traditional knowledge and customary laws, the Workshop recommended that the Permanent Forum commission a study on "customary laws pertaining to indigenous traditional knowledge in order to investigate to what extent such customary laws should be reflected in international and national standards addressing indigenous traditional knowledge".[3]

II. Overview of the current situation

4. There are a variety of documents, systems and activities that currently seek to address the lack of protection of indigenous traditional knowledge at national, regional and international levels. It is not necessary to provide an exhaustive list of the existing methods of protection for the purposes of the present report; however, an understanding of the more significant documents, systems and activities is crucial to understanding the nature of the issue and the environment in which a study

[1] See PFII/2005/WS.TK, annex I. Available from http://www.un.org/esa/socdev/unpfii/documents/workshop_TK_background_note.pdf.

[2] See *Official Records of the Economic and Social Council, 2005, Supplement No. 23* and corrigendum (E/2005/43 and Corr.2).

[3] E/C.19/2006/2, para. 41.

commissioned by the Permanent Forum would be located. An increased awareness of the current environment will also assist in determining exactly what is needed from such a study.

5. The right of indigenous peoples to protect and enjoy their traditional knowledge is recognized in a number of international instruments, including the following:

(a) Article 27 of the Universal Declaration of Human Rights;[4]

(b) Article 15, paragraph 1 (c), of the International Covenant on Economic, Social and Cultural Rights;[5]

(c) Article 27 of the International Covenant on Civil and Political Rights;[5]

(d) Article 8 (j) of the Convention on Biological Diversity;[6]

(e) International Treaty on Plant Genetic Resources for Food and Agriculture;[7]

(f) Articles 13, 15 and 23 of International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries;

(g) Berne Convention for the Protection of Literary and Artistic Works, as amended in 1979;

(h) Agreement on Trade-Related Aspects of Intellectual Property Rights;[8]

(i) Article 3 of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa;[9]

(j) Paragraph 12 (d) of the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests;[10]

(k) Paragraph 26.1 of Agenda 21;[11]

(l) WHO traditional medicine strategy, 2002-2005;[12]

(m) Principle 22 of the Rio Declaration on Environment and Development;[13]

---

[4] Resolution 217 A (III).

[5] Resolution 2200 A (XXI), annex.

[6] United Nations, *Treaty Series*, vol. 1760, No. 30619.

[7] Food and Agriculture Organization of the United Nations, *Report of the Conference of FAO, Thirty-first Session, Rome, 2-13 November 2001* (C 2001/REP), appendix D.

[8] See *Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15 April 1994* (GATT secretariat publication, Sales No. GATT/1994-7).

[9] United Nations, *Treaty Series*, vol. 1954, No. 33480.

[10] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex III.

[11] Ibid., annex II.

[12] WHO/EDM/TRM/2002.1 (Geneva, World Health Organization).

[13] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

(n) Articles 11 and 31 of the draft United Nations Declaration on the Rights of Indigenous Peoples.[14]

6. In addition to the above-mentioned texts and international instruments, there are numerous regional systems of protection, including the Draft American Declaration on the Rights of Indigenous Peoples of the Organization of American States; the Bangui Agreement of the African Intellectual Property Organization; the Tunis Model Law on Copyright for Developing Countries; and the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions. Other declarations include the Mataatua Declaration and the Kari-Oca Declaration.

7. At the national level, there are a multitude of legislative and policy initiatives aimed at addressing the issue of indigenous traditional knowledge. The following examples from several different States, which address environmental, health, medicinal and intellectual property aspects of traditional knowledge, illustrate the diversity of those approaches. A comprehensive list of legislative texts directed at the protection of traditional cultural expression can be found on the website of the World Intellectual Property Organization (WIPO).[15]

8. In Australia, environmental protection regulations recognize the special knowledge held by indigenous persons about biological resources.[16] The guidelines prepared by the Government of Australia for natural resource management recognize that indigenous peoples have links to the land and sea that are historically, spiritually and culturally strong and unique.[17] In the Northern Territory of Australia, traditional medicinal knowledge is partially recognized through the utilization of aboriginal health workers, who act as a bridge between traditional healers, indigenous communities and conventional medical practitioners.[18]

9. In Canada, health practices are regulated through legislative means at the federal and provincial levels, and some provincial laws specifically recognize aboriginal healing practices.[19] The Canadian *Environmental Assessment Act, 1992*, provides for the consideration of aboriginal traditional knowledge in conducting an environmental assessment.[20] Canada also utilizes aboriginal skills under its National Forestry Strategy 2002-2008 and the certification system for national forest management.[21]

10. In South Africa, the *Traditional Health Practitioners Act, 2004*, recognizes and regulates the practice of traditional medicine in that country. The South African *National Environmental Management Act, 1998*, directs decision makers on environmental matters to take into account all forms of knowledge, including traditional knowledge. Another example is Bolivia, where a national system of

---

[14] See General Assembly resolution 61/178 of 20 December 2006, annex.

[15] Available from http://www.wipo.int/tk/en/laws/folklore.html.

[16] *Environmental Protection and Biodiversity Conservation (Amendment) Regulations (No. 2) 2005*, part 8A.01(c).

[17] See http://www.nrm.gov.au/indigenous/index.html.

[18] See *Health Practitioners and Allied Professionals Registration Act 1985*.

[19] See *Health Act*, chap. 106. Available from http://www.gov.yk.ca/legislation/acts/health.pdf.

[20] Section 16.1.

[21] For additional information see http://www.for.gov.bc.ca/tasb/MANUALS/Policy/resmngmt/rm15-1.htm.

protected areas has been established under Supreme Decree No. 24122 of 1995, wherein traditional knowledge is acknowledged and used in management practice.

11. Ecuador recognizes the practice of traditional medicine in its national Constitution. In the Philippines, traditional medicinal practices are recognized by law. Section 4.(b) of the *Traditional and Alternative Medicine Act (TAMA) of 1997* defines traditional medicine as "the sum total of knowledge, skills and practice on health care, not necessarily explicable in the context of modern, scientific philosophical framework, but recognized by the people to help maintain and improve their health towards the wholeness of their being, the community and society, and their interrelations based on culture, history, heritage and consciousness".[22] In India, the World Health Organization worldwide review indicated that 70 per cent of the rural population depended on the Ayurvedic system of traditional medicine practices. The Government of India regulates traditional medicinal knowledge through the *Indian Medicine Central Council Act*.

12. Protection via intellectual property law in Nigeria is provided under the *Copyright Act, 1990*, which seeks to protect traditional folk law. Article 28, paragraph 5, defines folklore as "a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an inadequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means".[23] The Central African Republic copyright law defines folklore as all literary and artistic productions created by the national communities, passed on from generation to generation and constituting one of the basic elements of the traditional cultural heritage.[24] In Ghana, the copyright law seeks to protect traditional folklore under the *Copyright Act, 2005*, although its introduction was met with some controversy.

13. In many instances, domestic laws recognize indigenous customary law as the foundation of the relevant indigenous peoples' rights to land and heritage. Comprehensive coverage of such issues will be a matter of central concern to the scope of any study the Permanent Forum may choose to pursue.

14. In relation to provisions in international documents, various levels of protection are offered that are principally either protection as an aspect of human rights law or protection that specifically addresses indigenous traditional knowledge. Examples of human rights-based protection are found in article 27, paragraph 2, of the Universal Declaration of Human Rights[4] and in article 15, paragraph 1 (c), of the International Covenant on Economic, Social and Cultural Rights:[5] the former recognizes that everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author; the latter, that everyone has the right to take part in cultural life. In relation to indigenous traditional knowledge, however, the protection provided by such a provision is limited. This can be illustrated by considering the problematic notion of "author", which evokes an understanding of an individual and does not easily encompass communal creation and ownership.

15. An example of a more specific provision relating to indigenous traditional knowledge is article 8 (j) of the Convention on Biological Diversity.[6] Article 8 (j)

[22] Available from http://www.stuartxchange.org/TAMA.html.

[23] See http://www.nigeria-law.org/CopyrightAct.htm.

[24] Ordinance No. 85-002 on Copyright (Central African Republic) art. 9.

calls upon parties to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities that embody traditional lifestyles relevant for the conservation and sustainable use of biological diversity. Although article 8 (j) directly considers indigenous traditional knowledge, it is limited to situations where traditional knowledge is relevant to biological diversity and is simply not designed to provide holistic protection for indigenous traditional knowledge.

16. Arguably the most explicit provision for the protection of indigenous traditional knowledge is contained in the draft United Nations Declaration on the Rights of Indigenous Peoples[25] (draft Declaration), which currently awaits consideration by the General Assembly. Despite its present status, the draft Declaration provides a strong and persuasive statement in support of the protection of indigenous traditional knowledge. Article 31, paragraph 1, of the draft Declaration states the following:

> "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."

17. Importantly, paragraph 2 of article 31 states that States "shall take effective measures to recognize and protect the exercise of these rights". Article 11 of the draft Declaration emphasizes the right to practise and revitalize cultural traditions and customs and states that States shall provide redress through effective mechanisms, with regard to indigenous, cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs. The preamble of the draft Declaration also adds support to the protection of indigenous traditional knowledge by recognizing "that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment".[26]

18. Although international, regional and national documents do provide some protection for indigenous traditional knowledge, they fail to provide comprehensive protection. There are a number of United Nations agencies and intergovernmental organizations that are currently engaged in activities aimed at addressing this inadequate protection, including the World Intellectual Property Organization, the United Nations Development Programme (UNDP), the United Nations Conference on Trade and Development (UNCTAD), the Food and Agriculture Organization of the United Nations (FAO), the Conference of the Parties to the Convention on Biological Diversity, the Working Group on Indigenous Populations of the Subcommission on the Protection and Promotion of Human Rights and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

[25] See General Assembly resolution 61/178, annex.

[26] Ibid.

19. There are a number of significant activities that ought to be recognized; however, the latest activities of the World Intellectual Property Organization aptly represent the most recent developments. In 2000, WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to provide a forum to consider the interplay between intellectual property law and indigenous traditional knowledge. Two recent WIPO activities are of particular significance. First, the Committee has developed two comprehensive draft provisions addressing the protection of indigenous traditional knowledge. Those two documents set out a potential system of protection and aim to address comprehensively the practical issues that arise in the implementation of a sui generis system of protection. Second, the Committee has approved a study of customary law in recognition of the role of customary law and its relationship to indigenous traditional knowledge.[27] The study is, however, still in its early stages.

20. The World Intellectual Property Organization, through the Committee, has played a leading role in the push for the recognition of indigenous traditional knowledge and its protection from misuse and misappropriation. However, the pre-eminent role of WIPO has meant that the international debate has occurred primarily within the parameters of intellectual property law. International intellectual property law provides protection for creators of certain works, whether in the areas of literature, music, dance or art. Although this does at times suffice, for the most part intellectual property law fails to protect indigenous rights and interests because western constructs of intellectual property focus on individual knowledge and creativity rather than on communal transgenerational knowledge. Attempting to alter intellectual property law so that it accommodates traditional knowledge, knowledge that is completely different in essence, is reminiscent of the proverb, "You can't fit a round peg in a square hole". No matter how one tries, it just does not fit. It is for this reason that a completely new and customized approach is needed.

21. The call for sui generis protection has not necessarily been a call for an exchange of the current intellectual property system for a new system. It is a call for a sui generis system that complements the current system by providing protection to those areas of traditional knowledge that receive only very limited protection from international intellectual property law. Further, even where it has been recognized that sui generis protection is necessary, the sui generis protection contemplated has predominantly been located within the confines of a sui generis system of intellectual property law. Hence, the limited nature of such sui generis protection fails to account properly for the unique experiences of indigenous peoples, the unique nature of indigenous traditional knowledge and the role of customary law. Indigenous traditional knowledge is not simply a different type of intellectual property; it is a completely different entity. This is a distinction that is not generally appreciated, and as long as it remains unrecognized, questions will persist about the appropriateness of existing intellectual property regimes to protect indigenous interests.

[27] See http://www.wipo.int/tk/en/consultations/customary_law/index.html.

III. Objectives, scope and strategy of the study

22. It is recognized that international, regional and national documents provide some protection for indigenous traditional knowledge; however, they do not adequately address the concerns of indigenous peoples. The efforts by governmental bodies to prevent misappropriation and misuse of indigenous traditional knowledge, though admirable, are disparate and insufficient. Despite being an issue of international attention for many years and despite the creation of numerous documents, initiatives and activities, indigenous traditional knowledge is still vulnerable to misappropriation. Significantly, the fundamental question still remains; how can indigenous traditional knowledge be properly protected?

23. Acknowledging that the intellectual property regime is inadequate and recognizing the nature of indigenous traditional knowledge, the question becomes: should a sui generis system of protection be established that is unimpeded by western conceptions of intellectual property law but is instead guided by indigenous customary legal systems? If such a system is to be established, how can it and should it operate? A sui generis system grounded in customary laws could set standards and provide guidance to States as to the appropriate protection of indigenous traditional knowledge. In addition to providing international recognition of the right of indigenous peoples to enjoy their traditional knowledge and protect it from misappropriation and misuse and subsequently providing guidance to States, a framework that recognizes the relationship between indigenous traditional knowledge and customary law and provides space for the operation of indigenous legal systems will provide additional benefits to indigenous peoples that flow from the recognition of ownership.

24. **It is the recommendation of the Special Rapporteur that the Permanent Forum should commission a study, under its mandate to prepare and disseminate information, to determine whether there ought to be a shift in the focus on the protection of indigenous traditional knowledge away from intellectual property law to protection via customary law, and if so, how this should occur. The study should consider how indigenous traditional knowledge could be protected at an international level by utilizing customary law, including the extent to which customary law should be reflected, thereby providing guidance to States and subsequently protection at national and regional levels.**

IV. Issues to be considered by the study

25. Should the Permanent Forum accept the recommendation of the Special Rapporteur that a study be commissioned, a number of issues need to be addressed, both in the creation of the study and in the study itself.

A. Identifying the question

26. Embodied in the call for a study on customary laws pertaining to indigenous traditional knowledge are a number of questions and assumptions. In order to craft an effective study, careful consideration needs to be given to the nature of the question so that it will assist in determining both the nature and the parameters of

the study, which will in turn provide a foundation upon which an effective study can be built. There are three preliminary issues that must be considered: terminology, the nature of a sui generis system and the intended beneficiaries.

27. First, it must be recognized that there are some initial challenges posed by the variety of terminology used in this area. Terms such as "indigenous knowledge", "traditional knowledge", "indigenous knowledge, cultures and traditional practice", "folklore", "indigenous heritage" and "indigenous cultural and intellectual property" are often used interchangeably and invariably occur in different contexts, with different meanings attributed to them. Regardless of the terminology the Permanent Forum ultimately uses, the term should be clearly defined to indicate the parameters of the study. However, providing a comprehensive definition of traditional knowledge is a difficult task and one that has questionable benefits. If traditional knowledge is to be recognized and protected by providing a framework within which customary laws, as they relate to traditional knowledge, can operate, it may be in the best interests of indigenous peoples to leave the term undefined. The benefit of using a term that is clearly delineated from other terms but is not explicitly defined is that the content of the term is not fixed, and it will therefore be able to adjust and adapt to dynamic customary legal systems and novel aspects of traditional knowledge. The disadvantage of such an approach is that without a strict definition it may be difficult to ascertain what is actually included within such a term, which may lead to unacceptable levels of uncertainty. Such uncertainty could ultimately make any such instrument unworkable. Article 31 of the draft Declaration on the Rights of Indigenous Peoples may provide considerable guidance to the Permanent Forum in this regard.

28. Second, there needs to be a clear understanding of what exactly is being asked for when there is a call for a sui generis system of protection. In Latin, the term "sui generis" means "of its own kind", and the English meaning of the term is "unique". Sui generis is a term that has gained increased usage in indigenous rights jurisprudence, particularly as a vehicle to describe the unique interaction between indigenous peoples and dominant legal systems. Traditional knowledge is often labelled as sui generis to indicate the failure of dominant legal systems, particularly the intellectual property system, to properly account for it. The term is also used to positively affirm the unique nature and status of indigenous peoples and the right to protect their knowledge, customs and practices. However, it is important to ensure that sui generis does not ultimately result in reduced protection. Indigenous peoples have, in fact, experienced a reduction in specialized protection in other situations,[28] which may have come about as a result of the difficulties inherent in ensuring that dominant legal systems are sufficiently malleable to accommodate indigenous perspectives, experiences, rights and customary laws. In any event, it is crucial that whatever form of protection ultimately used has a positive impact on indigenous peoples and does not further alienate or misappropriate traditional knowledge and indigenous customary laws.

29. The call for sui generis protection may encompass a number of ideas. First, it may be used to indicate that the intellectual property regime is inadequate and to declare that there is a need for that system to adapt itself in unique ways in order to properly address the misappropriation and misuse of indigenous traditional

[28] For a list of resources concerning indigenous peoples' experiences with respect to sui generis systems and customary law practices, see UNEP/CBD/WG8J/4/7, annex I.

knowledge. Second, the call for a sui generis system may also be used to indicate that the current systems of protection are inadequate and that as a result of the unique nature of indigenous peoples, their culture, knowledge and law, there is a need for a unique system of protection that is not bound by current systems and structures of national or international law. Finally, it may also be used to indicate that indigenous legal systems are of their own kind and, as customary systems, bear little resemblance to western legal systems of common law, civil law and international law. As a result of that lack of resemblance, a unique way of protecting indigenous traditional knowledge is needed that is grounded in indigenous legal systems. This final view resonates most soundly with the question asked by the Permanent Forum. Whatever the idea may be behind the call for a sui generis system, it seems that in the case of traditional knowledge, the current systems and activities are insufficient and something radically different needs to occur. The Permanent Forum should consider assessing what manner of sui generis system is required and thereby clarify what the study intends to address.

30. The final preliminary issue that need to be considered concerns the intended benefits of the study and the intended beneficiaries. It is important to recognize that much of the focus on that issue has been on protecting indigenous peoples from the misappropriation and misuse of traditional knowledge without the free, prior and informed consent of the traditional knowledge owners. Any system of protection that is developed needs to ensure that traditional knowledge is not taken inappropriately, without the free, prior and informed consent of the relevant peoples. However, the desire to protect traditional knowledge also includes the desire to recognize ownership and control, which creates an opportunity for indigenous peoples and communities to utilize a valuable resource. Without in any way justifying misappropriation, the fact that indigenous traditional knowledge has been misappropriated for so long and in so many circumstances is indicative inter alia of the commercial value of traditional knowledge. Proper protection will enable indigenous peoples to own and control traditional knowledge. This ownership and control will include the ability to protect secret and sacred aspects of traditional knowledge. It will also enable indigenous peoples to engage in local, national and international economies in a commercially viable manner, if that is what communities desire. Indigenous peoples constitute some of the poorest communities in the world and disproportionately live in situations of poverty. The opportunity to engage in trade and utilize a commercially viable resource should not be underestimated.

31. It is important that the Permanent Forum properly conceive of the nature of the question and the objectives of the study, including definitional challenges, assessing a sui generis system and being aware that the protection of traditional knowledge can act as both a sword and a shield. It may be that the questions will initially be difficult to define and answer; however, by keeping them at the forefront of the study, the Permanent Forum will be able to determine the parameters of the study and ensure that it does not diverge from its intended course.

B. Determining the relationship between international, regional, national and communal forums

32. The role of customary law in providing guidance and protection to indigenous peoples' traditional knowledge and the nature of the owners of traditional

knowledge necessarily locates the indigenous community as a central component of these issues. It is generally the indigenous community collectively, as distinct from the individual, that owns the rights to traditional knowledge. It may be a section of the community or, in certain instances, a particular person sanctioned by the community, that is able to speak for or make decisions in relation to a particular instance of traditional knowledge. Hence, the role of the community is central. In addition, the operation of customary law occurs at a community level. The operation of customary law within an indigenous community is significant in shifting the focus of protection away from dominant legal systems, such as intellectual property, to a system based in or upon indigenous legal systems.

33. There are indigenous peoples living in approximately 70 countries throughout the world and constituting approximately 350 million people, including 5,000 distinct peoples and over 4,000 languages and cultures. Among this vast population are many indigenous legal systems. On a global scale, it is not unreasonable to assume that there are at least as many legal systems associated with a fair proportion of indigenous peoples throughout the world. While the centrality of the community is self-evident, the challenges lie in deciphering the relationship between indigenous communities and international, regional and national forums. The central question in deciphering those relationships is how to resolve the intersection between international, regional, national and communal systems.

34. Indigenous peoples have looked to the international arena as a place to seek protection of their rights and their way of life and as a place for indigenous voices to be heard. Despite the early denials of access,[29] the international arena is now heavily engaged in protecting indigenous rights and in raising awareness of indigenous issues. It can provide a focal point in a discussion, such as this one, that have a very broad reach. The lack of protection afforded to traditional knowledge is an issue of international significance. The international arena operates as a focal point for this important discussion, and international law provides certain vehicles, such as the development of an international instrument, that are available to remedy the lack of protection. In addition, the symbolic importance of this discussion occurring and being resolved in the international arena cannot be underestimated.

35. Domestic laws intersect with traditional knowledge at another level. In some States, national laws have been implemented to address the issue; however, it can be generally stated that these are ad hoc and on the whole do not provide adequate protection. A host of issues arise when considering the role of national laws in such matters, but the predominant question is simply, can national laws be used effectively? If the answer to that question is "yes", then it is necessary to ask why this has not occurred and why it is an issue that remains central on the international stage. Perhaps the issue is not so much a question as to whether national laws could be effective, but rather whether they could be effective without the guidance provided by some activity occurring at an international level. Nevertheless, this is not an issue that can remain simply within the domestic domain. If that were to occur, the chances of the issue being resolved for all indigenous peoples would be negligible. The implementation of national legislation or policy will be a tool in the process of developing mechanisms of protection for indigenous traditional

[29] See "10 stories the world should hear more about: indigenous peoples: living in voluntary isolation", *United Nations Chronicle Online Edition*. Available from http://www.un.org/Pubs/chronicle/2004/issue2/0204p18.asp.

knowledge. It should not, however, be an issue left solely for the domestic realm. There clearly needs to be an international standard to guide domestic implementation.

36. The regional dimensions of traditional knowledge must also be recognized. Existing regimes that operate, particularly in Africa, Asia and South America are cognizant of the regional dimension of the issue. Simply put, indigenous communities are not necessarily located within national borders, indigenous customary legal systems may cross borders and interactions between indigenous communities, such as through trade, may occur across national borders. For those and other similar reasons, the regional aspect of traditional knowledge must be taken into account by any proposed model of protection.

37. The principal challenge is determining how the intersections between communities, States, regions and the international forum should be resolved. Providing the backdrop to that challenge is the issue of uniformity. No matter what mechanisms of protection are considered, the question of uniformity will need to be addressed. Obviously the benefits of uniformity are many, including clarity and consistency of law. However, in the present instance, a tension exists between uniformity and the recognition of the variety and diversity of customary laws and indigenous traditional knowledge. If, on the one hand, uniformity is given primacy over and above the protection of diversity, then any protection afforded to traditional knowledge may be at the expense of recognizing customary laws or of recognizing the dynamic nature of customary laws. It seems that such an outcome would be a hollow victory. On the other hand, if the diversity of customary legal systems is given primacy over uniformity, it is likely that a complex legal web will be woven, which may ultimately result in varying levels of protection for indigenous peoples. The tension between uniformity and diversity is not a new issue in international law or a new issue for the Permanent Forum, but is one that has particular significance in the present circumstances.

38. If international law were to take a back seat in the discussion, it would be difficult to envisage a solution that was not ad hoc. Further, without utilizing international mechanisms, it seems likely that any hope of uniformity will be lost. International law must be at the forefront of any discussion of traditional knowledge. Through international processes and the role of international law, guidance can then be given to both national and regional forums.

C. Determining the relationship between the study and existing structures, activities and resources

39. As indigenous peoples' traditional knowledge covers a wide range of areas, the protection of indigenous traditional knowledge may intersect with various areas of law or international issues, such as intellectual property law, environmental law, heritage and sustainable development. As a result, activities have tended to focus on either a particular aspect of indigenous traditional knowledge or a particular interaction between indigenous traditional knowledge and a specific area of law. For example, some activities focus on traditional medicinal knowledge, whereas other activities take a more general approach to protection. In recognition of such diverse

approaches, consultation and coordination between agencies working in this area has increased.[30]

40. It will be necessary to identify existing systems, activities and resources and also identify all works in progress across the board. Identifying the existing systems and activities is crucial to ensuring that the work of the Permanent Forum is coordinated and integrated with the work of other United Nations and intergovernmental agencies. By being conscious of other agencies' activities, the Permanent Forum will be able to ensure that any work undertaken is structured in such a way as to avoid any unnecessary duplication. This will enable the Permanent Forum to undertake a study with the proper and efficient use of limited United Nations and Permanent Forum resources.

41. Existing systems and activities may be identified in several ways. It might be efficient to begin with a comprehensive literature review. Alternatively, it might be useful to initiate a follow-up workshop. In addition to ensuring that the Permanent Forum was updated as to the current state of affairs, a future workshop would allow experts and agencies to discuss the best way forward. However, depending on the approach taken by the Permanent Forum, a literature review might suffice and a workshop, if needed, might be more beneficial if it were to occur at a later stage in the study or perhaps even regularly for the duration of the study.

42. It is important that the Permanent Forum does not simply ascertain what systems, activities and resources already exist and then commission a study based on those arrangements. Once it has determined the structures and resources that either exist or are soon to exist, it will be necessary to assess their relevance and value as resources for this study. If such an assessment is not undertaken, the study may be misguided and the results of any study may be limited by assumptions embodied in prior work. For example, assessments should consider whether there are any assumptions underlying the work and whether the question and potential solutions being considered are located solely within a framework of intellectual property law and whether the work has been developed in consultation with indigenous peoples. The question of how those mechanisms should be assessed will need to be addressed by the Permanent Forum. A list of relevant objectives or criteria should be established to guide any such assessment. The assessment of existing mechanisms and resources will be fundamental in ensuring that there is optimal utilization of United Nations resources available to the Permanent Forum. Importantly, a proper assessment will identify areas that need to be addressed by the study and will also assist the Permanent Forum in determining the next step forward.

43. Once a proper assessment has occurred, the Permanent Forum will need to consider how any further developments that may result from the study may relate to existing mechanisms and resources. The Permanent Forum will also need to consider how any developments from the study will relate to any other developments that may occur, such as the creation of an international document by

[30] For example, UNESCO and WIPO have a history of collaboration, including the development of the Tunis Model Law on Copyright for Developing Countries (1976) and the formulation of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982). For an extensive list of collaborative efforts between the Conference of the Parties to the Convention on Biological Diversity and WIPO, see UNEP/CBD/COP/8/INF/41.

the World Intellectual Property Organization. Any future developments by other United Nations or intergovernmental agencies should complement, rather than inhibit, the outcomes of the study and vice versa.

D. Potential structures and outcomes

44. The Permanent Forum seeks to enquire whether customary laws could be reflected in international and national standards. As mentioned previously, it seems clear that an international framework of some sort is necessary to provide guidance to States in this area. According to the outcome document of the Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovation and Practices, held at Geneva from 30 October to 1 November 2000, national sui generis systems by themselves will not be sufficient to protect traditional knowledge adequately. There is therefore a need to explore an international mechanism that might explore minimum standards of an international sui generis system for traditional knowledge protection.

45. On that basis, the elements presented below are limited to potential mechanisms of protection located within the international arena. The presumption is that any mechanism developed internationally will in due course filter down to States and will be implemented nationally.

46. Although there are various options internationally, it seems that the principal options tend to involve the development of an international instrument. It has been suggested, by both the Workshop and the Permanent Forum, that customary laws should be reflected in international standards. That could occur through the creation of a treaty, a framework agreement, a memorandum of understanding or a number of other structures. It should be noted that the mechanisms considered in the present concept paper are not intended to limit in any way the potential structures that may be considered in the study.

47. A treaty is one way in which customary laws could be reflected in an international document and provide a strong basis upon which traditional knowledge could be protected. If a treaty were developed for the sole purpose of ensuring protection of indigenous traditional knowledge, rather than in unison with other issues, the level of specificity would need to be carefully considered. If articles within a treaty were highly specific and provided detailed requirements as to what might constitute traditional knowledge or what circumstances might be afforded protection, then this could potentially raise concerns of inflexibility. However, inflexibility is also an issue with respect to the operation of a treaty as a whole. For example, if customary law were to be completely reflected in an international treaty, this could inhibit the development of customary law, and the treaty could be perceived as unnecessarily inflexible. A treaty that specifically details the subject matter would be uniform in nature, but indigenous peoples, customary laws and traditional knowledge are not uniform in nature. The concern with such a treaty is that it might not allow enough room for the operation of the diverse customary legal systems of diverse indigenous peoples throughout the world.

48. Similarly, in addition to potentially being inflexible with respect to its subject matter, a specific treaty that seeks to codify customary law may struggle to aptly protect the rights of indigenous peoples to their traditional knowledge. The reason for this is that any attempt to codify customary law at international level will be

artificial. For example, the vast number of indigenous legal systems in the world are not uniform. Although there may be certain commonalities, such as a tendency for communal rather than individual ownership, this may not always be the case. As a result, any attempt to reflect customary law in international law by articulating customary law principles as they pertain to traditional knowledge may in fact limit the operation of customary law and accordingly, fail to protect traditional knowledge. Such an outcome could have disastrous effects on indigenous peoples. The same concerns would apply if customary laws were not codified internationally but a treaty encouraged codification nationally.

49. A further issue to consider is the question of what mechanism would be put in place to handle disputes over the interpretation of indigenous traditional knowledge. The issue of interpretation becomes particularly important in situations of secret or sacred knowledge. If customary law is subject to some form of codification, the question of who interprets the law is pertinent. In the case of an international treaty, disputes may be resolved by way of diplomacy, through an entity created by that treaty for that particular purpose, such as a tribunal or a committee, or in some circumstances through the International Court of Justice. In such a situation, it would be important to recognize that it is States that have standing in the Court. Private persons, collectivities and international organizations are not entitled access to the Court, although public international organizations, including such specialized agencies as the World Intellectual Property Organization and the organs of the United Nations do have access in various circumstances.[31] In order for the Court to deal with disputes under a treaty to protect indigenous traditional knowledge it would be necessary for that treaty to include a jurisdictional provision enabling such access to occur.[32] The study may find that dispute resolution and legal interpretation via the International Court of Justice is not the preferred option. In any event, the process of treaty-making necessarily requires some mechanism or some forum in which disputes, including disputes as to the interpretation of provisions, can be resolved. By codifying customary law and completely or substantially reflecting customary law in an international instrument, the danger for indigenous peoples is that the power of interpretation of the treaty, including the power to interpret customary laws, will be posited in a non-indigenous body. It may be that a central body would be useful to settle such disputes; however, such a decision should be made with caution while being cognizant of the potential for such a body to usurp the power of indigenous peoples to interpret the law and, consequently, their power to make laws.

50. The study should also consider the development of a treaty that does not specifically articulate principles of customary law but still provides general protection to traditional knowledge. Such a treaty may provide fairly general protection, although in more detail than article 8 (j) of the Convention on Biological Diversity or the draft Declaration, but also provide the actual mechanics of such protection, including provisions for arbitration and enforcement. Such a treaty would reflect customary law but not articulate customary law. Although situated nationally, an example of general protection can be found in section 35, paragraph 1 of the Constitution Act of Canada, 1982, which states, "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and

[31] See http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicorgansandspecialized.html.

[32] See *Statute of the International Court of Justice*, article 36, para. 2. Available from http://www.icj-cij.org/icjwww/icjhome.htm.

affirmed". A provision that recognizes and affirms the rights of indigenous peoples to their traditional knowledge may be a conduit for international recognition while avoiding the dangers of detailed articulation of customary laws. A provision that recognizes and affirms traditional knowledge would provide legal space for the operation of customary laws. It may be that subsequently a more complex legal relationship would need to be developed between indigenous customary law and domestic law; however, that relationship would be guided by the international recognition and affirmation of indigenous peoples' rights to their traditional knowledge.

51. Two different approaches to the creation of a traditional knowledge treaty have been suggested: a specific treaty that codifies customary law to some extent, and a more general treaty that creates legal space for the continuing operation of indigenous legal systems without impinging upon their operation. In considering whether either of those proposals is a viable option, the study by the Permanent Forum should consider the relative advantages and disadvantages. As mentioned, issues of uniformity, flexibility, dispute resolution and interpretation ought to be part of the process of assessing the relative merits of the models. In addition, the study must carefully consider the issue of registration. The study should also closely examine the appropriateness of codification: it may not be the ideal method for indigenous peoples to retain control of their customary law.

52. In addition to advocating the creation of a treaty, the Permanent Forum should promote other structures, such as a framework agreement or a memorandum of understanding.

53. Regardless of which models are contemplated, the Permanent Forum will need to consider whether there should be a document, structure or forum that addresses all aspects of indigenous traditional knowledge or whether there should be a separation of issues across various documents, structure or forums. On the one hand, if there is to be a separation, then how could customary law be recognized across diverse areas? Could this occur with uniformity? On the other hand, if a central document or structure were to be created, how would it interact with existing instruments, such as article 8 (j) of the Convention on Biological Diversity? Such questions will need to be considered irrespective of the mechanisms of protection that are examined. Further, the question of arbitration should be carefully considered. The study should consider whether a body should be established that is constituted by indigenous peoples or whether, alternatively, an established forum, such as the Human Rights Council, could be utilized. Finally, no matter which vehicle is used, the questions of enforcement and mechanisms for compliance will need to be addressed.

54. In addition to legal mechanisms for protection, it is important for non-legal approaches to be considered. Although a legal response is most likely necessary, it may be beneficial to consider what structures could exist outside of the international forum. For instance, the Permanent Forum might be able to advocate initiatives, such as the creation of an indigenous label similar to the Fairtrade Certification Mark, in order to identify indigenous ownership.[33] Such a campaign might have far-

[33] Report of the UNCTAD-Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework, held at Geneva,

reaching effects and could assist in raising awareness of this issue globally. It could be undertaken as an initiative, either separately or in addition to the creation of a formal instrument.

55. In summary, there are a number of potential mechanisms of protection located within the international arena that could reflect customary law to varying degrees and that could be developed in order to properly protect indigenous traditional knowledge both at an international and a national level. Careful consideration of the relative benefits of each instrument will help to develop a mechanism of protection that assists indigenous peoples in their fight to protect their traditional knowledge. Although the process of developing an instrument or structure will not be easy and a host of difficult issues will need to be addressed, the process itself is important. By engaging in a consideration of potential structures with an awareness of the issues outlined above, the Permanent Forum will be able to navigate its way through this complex area.

V. Concluding comments

56. The Permanent Forum may consider it appropriate to recommend to the Economic and Social Council that it commission a study under its mandate as one way of resolving the issue of protecting indigenous traditional knowledge. Furthermore, the Permanent Forum may consider providing advice to the Economic and Social Council about the conduct of the study, including what role the Permanent Forum might be given in the examination of this question. Alternatively, the Permanent Forum may decide to examine the issue under its own mandate.

57. The Permanent Forum could create a subsidiary forum, such as an intersessional meeting, appoint a Special Rapporteur or leave the matter with organizations currently engaged in this issue. The Permanent Forum could decide the best approach is to support the existing processes. As another option, the Permanent Forum may consider dedicating part of one of its sessions, making it into a working session of three days or so, to consideration of the matter. The Permanent Forum could also, as another approach, appoint five or so members to hold specialized meetings on indigenous traditional knowledge during its sessions. If an intersessional meeting were decided upon, it could consist of members of the Permanent Forum and representatives from the United Nations, intergovernmental agencies and indigenous experts involved in the issue, which may provide a suitable forum for overseeing the study. The potential role of the inter-agency support group should also be taken into account. The Permanent Forum should also consider whether a Special Rapporteur dedicated to this task should be appointed or whether the study should be left in the charge of other entities. Regardless of how the study is initiated, the question of an appropriate budget will need to be considered, bearing in mind that the question of resources available to the Permanent Forum remains unresolved.

58. There are several other practical matters that may need to be addressed initially, such as whether there should be "exploratory missions" and whether pilot projects should be established in particular countries, and if so, at what stage of the

Switzerland, 4-6 February 2004. Mimeo. Available from http://www.unctad.org/trade_env/test1/meetings/tk2/TKworkshop.report.final.2August2004.pdf.

project. As those decisions will have budgetary ramifications, it would be beneficial if they were contemplated at the outset.

59. In constructing a study that aims to address the continued failure to protect traditional knowledge, the Permanent Forum should be cognizant of the process. Developing an appropriate process as to how this issue should be addressed will assist in working towards a successful outcome. The study should call upon the experience gained surrounding the elaboration of the draft United Nations Declaration on the Rights of Indigenous Peoples through the United Nations system. The capacity of such a process to educate and generate cross-cultural awareness should not be underestimated. The Permanent Forum may wish to consider how, and to what extent, indigenous peoples can be involved in setting up the study. This may be done by consulting indigenous peoples as to what process should be used or by developing a code of conduct.[34] Although this will take some time, if there is to be a shift to a truly sui generis system of protection, creating a sui generis system of enquiry may be a crucial first step.

60. The Permanent Forum, in addition to considering what role it wishes to have and how to develop an appropriate process, should consider the intended outcomes of the study. Those considerations include articulating the expected accomplishments of the study and developing indicators of achievement or evaluation criteria in order to determine the quality and effect of the study. Although the criteria could be amended as the study evolved, they would be an important part of the process of clarifying the intended objectives of a study. The study must be mindful not to raise the expectations of indigenous peoples unnecessarily and unrealistically.

61. Despite being an issue of international attention for many years, indigenous traditional knowledge is still vulnerable to misappropriation. It is time to recognize that indigenous traditional knowledge is not simply an intellectual property issue. Likewise, it is not simply a human rights issue, a trade issue or an amalgamation of those issues. The proper protection of indigenous traditional knowledge is an indigenous issue and indigenous peoples should be central to the process.

[34] See UNEP/CBD/WG8J/4/8.